



POLICE DEPARTMENT

December 18, 2014

MEMORANDUM FOR: Police Commissioner

Re: Detective Michael Rivera
Tax Registry No. 927423
Narcotics Borough Staten Island
Disciplinary Case Nos. 2013-10648 & 2014-11941

Sergeant Cornelius Buckley
Tax Registry No. 903506
Narcotics Borough Staten Island
Disciplinary Case No. 2013-10649

The above-named members of the Department appeared before me on September 29, 2014, charged with the following:

Disciplinary Case No. 2013-10648

1. Said Detective Michael Rivera, on or about June 13, 2012, at approximately 1740 hours while assigned to the Narcotics Bureau Staten Island and in the vicinity of the intersection of Olympia Boulevard and Orlando Street, Richmond County, abused his authority in that he wrongfully and without just cause searched Person A without sufficient legal authority. P.G. 212-11, Page 1, Paragraph 3 STOP & FRISK

Disciplinary Case No. 2014-11941

1. Said Detective Michael Rivera, on or about April 26, 2013, at approximately 09:15 hours while assigned to the Narcotics Bureau Staten Island and in the vicinity of the intersection of Corson Avenue and Westervelt Avenue, Richmond County, abused his authority in that he stopped Donald Resse, Jr. without sufficient legal authority. P.G. 212-11, Page 1, Paragraph 1 STOP & FRISK

2. Said Detective Michael Rivera, on or about April 26, 2013, at approximately 09:15 hours while assigned to the Narcotics Bureau Staten Island and in the vicinity of the intersection of Corson Avenue and Westervelt Avenue, Richmond County, abused his authority in that he stopped Jordana Resse without sufficient legal authority. P.G. 212-11, Page 1, Paragraph 1 - STOP & FRISK

Disciplinary Case No. 2013-10649

1. Said Sergeant Cornelius Buckley, on or about June 13, 2012, at approximately 1740 hours while assigned to the Narcotics Bureau Staten Island and in the vicinity of the intersection of Olympia Boulevard and Orlando Street, Richmond County, abused his authority in that he wrongfully and without just cause frisked Person B without sufficient legal authority. P.G. 212-11, Page 1, Paragraph 2 – STOP & FRISK

The Civilian Complaint Review Board (CCRB) was represented by Heather Cook, Esq., Respondent Rivera was represented by Michael Lacondi, Esq. and Respondent Buckley was represented by John D'Alessandro, Esq. Respondents through their counsel, entered a plea of not guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

After evaluating the testimony and evidence presented at the hearing, and assessing the credibility of the witnesses and hearsay declarations, this tribunal finds that there was insufficient evidence to support a finding that Respondents engaged in the charged misconduct. Accordingly, Respondent Rivera is found not guilty of the charges set forth in Disciplinary Cases Nos. 2014-11941 and 2013-10648 and Respondent Buckley is found not guilty of the charge set forth in Disciplinary Case No. 2013-10649.

FINDINGS AND ANALYSIS

1. Disciplinary Case No. 2014-11941: Jordana and Donald Resse Stops

Respondent Rivera is charged with abusing his authority in that he stopped Donald and Jordana Resse without sufficient legal authority. Upon review of the record, this tribunal finds that the evidence presented failed to establish that Respondent's actions constituted misconduct.

The following facts are undisputed. At approximately 0915 hours on April 26, 2013, Jordana Resse and her husband Donald parked their [REDACTED] the vicinity of Corson Avenue and Westervelt Avenue in Staten Island. They had just left their eight-year-old daughter at her elementary school and planned to meet up with her later to accompany her on a class trip. They parked in that location because it was the

first available spot close to the school. Mr. and Mrs. Resse were hungry and purchased a corn muffin at a nearby store. As they stood by their car waiting for the school bus, Mr. Resse stretched out his arm to place a small, inch to two inch, irregularly shaped piece of corn muffin in Mrs. Resse's mouth. The corn muffin was described as white or light yellow. (Tr. 16-20, 25-27, 30, 33, 37)

At approximately 0915 hours, Sergeant Buckley, Lieutenant Ortiz and Respondent Rivera were driving down Corson Avenue in an unmarked police vehicle. They were conducting plainclothes narcotics enforcement operations in what was considered to be a high crime area. From their unmarked vehicle, both Respondent Rivera and Lieutenant Ortiz observed Mr. Resse hand Mrs. Resse a small white item which they thought to be a controlled substance. The item was placed in Mrs. Resse's mouth. The officers were approximately "half a vehicle away" when they made this observation. All three officers exited the car and approached the couple to investigate. Almost immediately, Sergeant Buckley saw the corn muffin and said, "I think this is a negative." He was about to return to the police vehicle when Mr. Resse turned around and a verbal exchange ensued. At this point it became clear to Respondent Rivera that he had been mistaken and that what he had actually observed was not the ingestion of a narcotic but a husband giving his wife a small piece of corn muffin. Respondent Rivera asked the couple for identification, which they produced voluntarily. He then used their identification to fill out a UF-250 form to document the stop. Although the testimony presented by each party differs significantly with respect to details, by all accounts it was an acrimonious encounter and the couple left feeling "shocked," "stunned" and "upset." (Tr. 28, 31-32, 36-37, 42-44, 46 50 61-62, 64, 68, 71-72)

The sole issue in this case is whether Respondent Rivera had sufficient legal authority to stop Mr. and Mrs. Resse. The preponderance of the credible evidence established that Respondent Rivera was authorized to make this stop.

As set forth in *Patrol Guide Procedure* 212-11 (1), a "stop" is "to temporarily detain a person for questioning." The *Patrol Guide* further states that: "When a uniformed member of the service reasonably suspects a person has committed, is committing or is about to commit a felony or a Penal Law misdemeanor," that officer may "stop [the] person and request identification and explanation of conduct." The

Patrol Guide echoes the legal standard established in the seminal New York State case on police stops, *People v. Cantor*, 36, N.Y.S.2d 106 (1975). It is noted that in such cases, police officers must explain the underlying facts which led them to believe that they had reasonable suspicion to conduct a stop. Whether a stop was permissible is fact specific and requires a case by case determination. Respondent Rivera satisfied that burden by articulating a reasonable basis for this particular stop.

Various factors can lead to a reasonable suspicion that a drug transaction has occurred. These include whether the location has a high incidence of drug sales, the officer's experience and training, and the behavior of the suspects. *People v. Jones*, 90 N.Y.2d 835, 837 (1997) These factors weigh in favor of a finding that Respondent Rivera had reasonable suspicion to make this stop. Respondent Rivera is an experienced detective who has been working in Narcotics Borough of Staten Island since 2005. His assignment on the day at issue was to observe narcotics crimes in New Brighton, a high crime area known for drug activity. He and two other experienced officers were specifically patrolling the area for what is known as "hand-to-hand" transactions where drugs are passed on from one individual to another on the street. Respondent Rivera credibly testified that from his vehicle he observed a male give a female an item which was placed in her mouth. Respondent Rivera described the specific item he saw as white and measuring about an inch in length. This description was confirmed by the complaining witness. Given the location, and the fact that a small, white item was passed from one individual to another and then placed in her mouth, Respondent Rivera was reasonable in believing that he might have witnessed a narcotics transaction in which an illegal substance, possibly a pill, was ingested. His suspicion was further raised by his credible testimony that the female was "looking around...." (Tr. 46, 59-61, 63, 68) Under this specific set of circumstances, these clearly articulated factors, which included a description of the transferred object, are sufficient to justify Respondent Rivera's inquiry. Accordingly, Respondent Rivera was authorized to stop Mr. and Mrs. Resse, request their identification and ask them to explain their conduct. ⁱ

It is irrelevant to this analysis that Respondent Rivera was ultimately wrong in his assessment that a narcotics transaction had taken place or that Sergeant Buckley realized their mistake moments before he did. Not every mistake or error in judgment constitutes

sanctionable misconduct. It is well established that a finding of misconduct requires some demonstration of willful, intentional or negligent conduct on an employee's part. *Ryan v. New York State Liquor Auth.*, 79 N.Y.S.2d 827 3d Dep't 1948); *Disciplinary Case No. 2013-9648* (June 17, 2014)(Stop justified because the odor of marijuana on the street and the civilian smoking a cigar in the area gave Respondent founded suspicion to make the stop and ask questions) Here, the preponderance of the credible evidence established that Respondent Rivera acted in good faith by investigating his reasonable suspicion that a crime had taken place.

In making this finding, I acknowledge Mr. and Mrs. Resse's distress at being approached by three police officers as they ate a muffin and waited for their daughter's class trip. It is certainly understandable that they were taken aback when these officers inquired about illegal drugs as they innocently waited on the street. Given the totality of circumstances in this case, however, Respondent Rivera's actions were objectively reasonable and therefore permissible. Accordingly, the charges are dismissed.

2. Disciplinary Case No. 2013-10648: Person A Search

Disciplinary Case No. 2013-10649: Person B Frisk

The following facts are undisputed. On June 13, 2012, Respondents were assigned to the Narcotics Bureau Staten Island. At approximately 1740 hours, they were driving in an unmarked vehicle down Olympia Boulevard between Sand Lane and Orlando Street – a location identified by the 122 Precinct as a narcotics corridor. Respondents observed Person A give Person B an item in his hand. They then observed Person B look at the item in his hand. Respondent Rivera recognized both Person B and Person A as having been involved in prior drug arrests. Based on this information, Respondents believed that they witnessed a hand-to-hand drug transaction. They turned the vehicle around, exited and approached Person B and Person A to investigate. (Tr. 77-80, 107-110, 116-118; Resp. Ex. A)

As Respondents approached, Person A placed his right hand behind his back as he walked away facing Respondents. Person A explained his behavior to the CCRB by claiming that he was adjusting his pants. It is uncontested that he refused Respondents' repeated lawful orders to stay in place and show his hands. Respondents feared that

Person A was reaching for a firearm, drew their guns and pointed them at Person A. They were less than six feet away from Person A at the time and had no cover. For their safety, Respondent Buckley cuffed Person A while Respondent Rivera still had his gun drawn. Respondent Buckley told Respondent Rivera to frisk Person A. Respondent Rivera patted Person A and shook his pants. No weapons were found. (Tr. 80-81; 91, 110-116, 119-123, 129, 133; CCRB Ex. 1)

After Person A was secured, Respondent Buckley turned his attention toward Person B who was walking away on Olympia Boulevard toward Sand Lane. When Respondent Buckley called out to Person B to stop, he turned around with his hands up as if to say, "what?" Respondent Buckley frisked him and escorted him back to where Respondent Rivera and Person A were standing. Respondents requested identification, ran a warrant check on Person A, filled out the UF-250 forms and released the men. (Tr. 80-84, 111)

Respondent Rivera was charged with having abused his authority by searching Person A. Respondent Buckley was charged with having abused his authority by frisking Person B. Upon review of the entire record, this tribunal concludes that there is insufficient evidence to support either of these charges.

a. Person A Search

Respondent Rivera admitted that he frisked Person A for weapons, but denied having conducted a search of his person. At trial, Respondent Rivera was a direct and straightforward witness who credibly testified that Respondent Buckley told him to frisk Person A because he had seen a bulge in the back of his body in the area where Person A had hidden his right hand. Respondent Rivera explained that he patted down that area, felt something hard, grabbed the item and then shook it from the exterior to assess whether it was a weapon. He did not feel anything unusual and determined that Person A was not armed. Respondent Rivera insisted at trial that he did not go into Person A's pockets and did not frisk any other areas. (Tr. 111-113, 132-133)

CCRB concedes that the stop, the frisk, the restraint and the use of force were appropriate, but sought to prove at trial that Respondent Rivera exceeded his authority by taking the extra step of searching Person A to expose items that were not in plain view. Person A, however, did not appear at the hearing. Instead, CCRB relied primarily on

Person A's CCRB interview to prove its case. Person A told the CCRB that Respondent Rivera searched him repeatedly both before and after he was handcuffed. He claims that Respondent Rivera frisked his entire body, pulled on his pants and took everything he was carrying out of his pockets and his wallet. (CCRB Ex. 1 pgs. 29, 36-42, 62, 66) It is left to this tribunal to sort out which version of events is closest to the truth.

Although hearsay is admissible in an administrative tribunal, it must be sufficiently probative and reliable to be accorded probative weight. *Ayala v. Ward*, 170 A.D.2d 235, 565 N.Y.S.2d 114 (1st Dep't 1991), *lv. to app. den.*, 78 N.Y.2d 851, 573 N.Y.S.2d 69 (1991). Where, as here, the hearsay evidence is controverted, a fact finder must very carefully scrutinize the nature and reliability of the out of court statement. *In re Matter of 125 Bar Corp. v. State Liquor Authority of the State of NY*, 24 N.Y.2d 174 (1969).

The hearsay statement presented in this case was of insufficient reliability to support the charge that Respondent Rivera searched Person A without sufficient legal authority. The most significant factor that weighed against the trustworthiness of Person A's hearsay statement was his inconsistent description of critical facts. At his CCRB interview, Person A told the investigator that Respondent Rivera patted him down and searched him "four or five times" both before and after he was handcuffed. Specifically, he stated that Respondent went into his pockets and removed everything, including his wallet. Person A, however, contradicted himself on this critical point by also telling the CCRB investigator that before being handcuffed he handed his wallet over to Respondent in response to a request for identification. (CCRB Ex. 1 p. 7, 29, 36-40, 66-68) This tribunal finds that an inconsistency of this magnitude, on a key factual issue, is alone sufficient to discount the probative value of Person A's out of court statement.

In addition, this tribunal did not credit Person A's assertion that he was searched before he was handcuffed. This tribunal believed Respondents' testimony that Person A's actions led them to believe that he was reaching for a firearm while they were at close range with no cover. It is also uncontested that Respondents drew their firearms, pointed them at Person A and handcuffed him for their own safety. Given that the officers feared that Person A was reaching for a firearm, it is highly unlikely that they would have asked

Per. A to go into his pockets to pull out his identification before ensuring that his hands were secured in handcuffs. It is much more likely that Respondents handcuffed Person A before obtaining his identification or proceeding with a frisk. Person A's insistence that he was frisked and searched before being cuffed, at a time when the officers had their guns drawn and pointed at him, weighed heavily against the believability of his description of events.ⁱⁱ

Moreover, this is exactly the type of case where the test of cross-examination is necessary to assess details, motives and ultimately, the reliability of a complaining witness account. Person A's demeanor during his CCRB interview raised concerns. Although his voice sounds strong in the recording, it seemed that he was having some trouble. The interviewer asked Person A more than once whether he was "okay" and Person A left at one point to take a break. Although Person A explains that he was tired and hot, this tribunal is left wondering whether his condition had any effect on his recollection of events.

In short, Person A's hearsay statement was so lacking in reliability that it was insufficient to prove that Respondent Rivera engaged in the charged misconduct. Accordingly, the charge is dismissed.

b. Person B Frisk

It is uncontested that Respondent Buckley frisked Person B. *Patrol Guide Procedure* 212-11 (2), permits frisks when an officer "reasonably suspect[s]" that he "or others are in danger of physical injury." Respondent Buckley testified at trial that he frisked Person B because he saw a bulge in his "right front side" and gave him a "quick pat for ... safety because this could be a weapon." The bulge turned out to be a cell phone in a case clipped to his belt. (Tr. 81-82) At issue is whether Respondent was authorized to conduct that frisk.

Person B did not file a complaint with the CCRB and was not interviewed by CCRB investigators. Thus, this tribunal is not privy to Person B's version of events. Instead, during closing arguments CCRB asked this tribunal to make negative inferences and findings of fact against Respondent Buckley based on the evidence summarized below:

- Respondent Buckley allowed Person B to walk away while he and Respondent Rivera drew their guns on Person A.
- At his CCRB interview, Respondent Buckley stated that he considered Person B a “non-threat.”
- At his CCRB interview, Respondent Buckley told the investigator that he frisked Person B, but he did not explain the basis for the frisk.

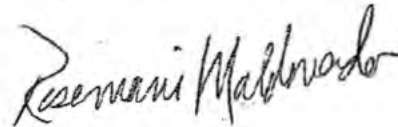
This tribunal is not persuaded that the CCRB satisfied its burden of proof in this case. I found Respondent Buckley to be a serious and straightforward witness. As noted above, Respondent Buckley testified that the basis for the frisk was a bulge that turned out to be a cell phone in a holster. Given the totality of circumstances in this case, I credited this testimony. For the reasons set forth below, the CCRB’s attempt to challenge Respondent Buckley’s trial testimony was not successful.

First, although it is accurate that Respondent Buckley did not state the basis for this frisk at his CCRB interview, at trial I credited his reason for this purported omission. Respondent Buckley was called to the CCRB to answer questions about the Person A complaint. It is within this context that Respondent Buckley offered the investigator a general narrative of his encounter with Person B and Person A, including the general statement, “[I] don’t know how Person B came back, but he came back and we frisked him as well. He did not have any weapons.” (Resp. Ex. A p. 8) Respondent Buckley continued his narrative, again focusing on Person A who was the complainant. After Respondent Buckley concluded this general statement, the CCRB interviewer did not follow-up to ask why Person B was frisked. Instead the interviewer asked about Person A’s stance during the stop and the position of Person A’s arms. In short, neither Respondent Buckley nor the CCRB interviewer focused on Person B’s frisk. Under these circumstances, it would be unfair to characterize Respondent Buckley’s statement as inconsistent with his trial testimony.

Second, CCRB posits that Respondent Buckley should be disciplined for this frisk because during the stop he let Person B walk away and at his CCRB interview called Person B a “non-threat.” As stated above, in this case I cannot place much probative value on the statements made during a CCRB interview concerning the specifics of another complainant. Moreover, I credited Respondent Buckley’s trial testimony that he

misspoke at the CCRB when he said that Person B was a “non-threat” during the entire interaction. He explained that at first his primary focus was to protect himself and his partner from what he perceived to be the imminent threat of Person A reaching for a firearm. It was only after securing Person A that he turned his attention to Person B and retrieved him. This was a very reasonable approach. Given this scenario, the fact that Person B was “allowed” to walk away does not belie Respondent Buckley’s trial testimony that he observed a bulge when he retrieved Person B, feared that it might be a weapon and frisked the area to ensure his safety. Accordingly, the charges are unfounded and dismissed.

Respectfully submitted,



Rosemarie Maldonado
Deputy Commissioner, Trials

APPROVED

FEB 02 2015

WILLIAM J. BRATTON
POLICE COMMISSIONER

ⁱ In closing, the CCRB cited *People v. Cornelius*, 113 A.D.2d 666 (1986), in support of its argument that this was an unjustified stop. *Cornelius* is not applicable to the case at hand. In *Cornelius*, the officers stopped a man walking in a high crime area because he was dressed in a dirty coat and was “stopping” and “looking around.” The Court invalidated that stop and citing *People v. De Bour*, 40 NY2d 210 (1976) stated that “We have frequently rejected the notion that ... innocuous behavior alone will ... generate a founded or reasonable suspicion that a crime is at hand.” In this case, although the behavior was ultimately innocuous, Respondent Rivera articulated more concrete observations that were indicative of criminality including a description of the item he thought was a narcotic.

ⁱⁱ In making this finding this tribunal took into account CCRB’s argument that Respondent Rivera did not initially remember the specifics about a bulge at his CCRB interview. This point was not persuasive. The UF-250 form filled out by Respondent Rivera on the day of the encounter indicated that Person A was frisked because of a bulge. This tribunal credited Respondent Rivera’s testimony that the UF-250 form jogged his memory that the bulge was a wallet.